IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.10.2006

CORAM:

THE HON'BLE MR. JUSTICE K.MOHAN RAM

Second Appeal No.201 of 2006
and C.M.P.No.3129 of 2006

Manivanna Gounder .. Appellant/Plaintiff

-Vs-

Pachaiappa Gounder .. Respondent/Defendant

APPEAL against the judgment and decree in A.S.No.23 of 2005 on the file of the Principal Subordinate Judge, Tindivanam dated 22.11.2005 in confirming the judgment and decree in O.S.No.146 of 1999 on the file of the Additional District Munsif Court, Tindivanam, dated 03.03.2005.

For Appellant : Mr. V.Raghavachari

For Respondent : Mr. P.Mani

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J U D G M E N T

The plaintiff in O.S.No.146 of 1999 on the file of the Additional District Munsif Court, Tindivanam aggrieved by the dismissal of the suit by the judgment and decree dated 22.11.2005 in A.S.No.23 of 2005 on the file of the Principal Sub-Court, Tindivanam has filed the above second appeal.

2. For the sake of convenience the parties are referred to as per their ranking in the suit.

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3. The brief facts of the case are as follows:-

The plaintiff and defendant are brothers. The suit property was purchased by the plaintiff from one Govindaraja Gounder on 17.05.1960 and from then on he is in possession and enjoyment of the same. During the life time of their father certain properties were purchased by the joint family and after the death of their father some of the joint family properties were orally partitioned

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and after partition they are enjoying the same separately. The suit property was purchased by the plaintiff from the income earned by him by rearing of goats. The plaintiff, defendant and the two other brothers left out the suit property from partition. Neither the defendant nor the other brothers have got any right over the suit property and except the defendant no other brother is claiming any right over the suit property. Since the defendant claiming a right over the suit property, tried to interfere with the possession of the plaintiff on 16.04.1998 the suit has been filed seeking declaration and permanent injunction.

4. The defendant has filed a detailed written statement. The defendant interalia contended that the suit property was purchased in the name of the plaintiff as he happened to be the elder son during the life time of the father-Swaminatha Gounder for the benefit of the joint family and the suit property is not the separate property of the plaintiff; the averment in the plaint that apart from the plaintiff and defendant there are only two brothers is denied; apart from the plaintiff and defendant three other brothers namely Ranganathan, Subramani and Jayamurthy are there and four sisters by name Valliammal, Sengeniammal, Pachaiyammal and Saroja are there; the father-Swaminatha Gounder died in 1962; 2 sisters were married prior to 1962 and 2 sisters were married after 1962; utilising the income derived from the property owned by the mother-Muniyammal and the father-Swaminatha Gounder, the suit property was purchased on 11.06.1993 in the name of the plaintiff as he happened to be the elder son and the same is being enjoyed by the plaintiff and the defendant and thereafter the properties were purchased on 05.11.1976, 30.03.1978 and 25.04.1981 jointly in the name of all the five sons and the same are being enjoyed in common by all the brothers; there was no partition of the joint family properties; the mother-Muniammal died in January 1999; thereafter with an intention to harass the brother the suit has been filed claiming the suit property as the separate property of the plaintiff; the suit has been filed suppressing the fact that there are other brothers and sisters who are necessary parties to the suit and the suit is barred for non-joinder of necessary parties.

5. On the basis of the above said pleadings the trial court framed as many as 12 issues, but took up for consideration only the following issues namely:-

(i) Whether the suit property was purchased on 17.05.1960 in the name of the eldest son-the plaintiff, during the life time of Swaminatha Gounder, the father of the plaintiff and defendant for the joint family?

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(ii) Apart from the plaintiff and defendant whether Swaminatha Gounder had other children namely Ranganathan, Subramani, Jayamurthy, Valliammal, Sengeniammal, Pachaiyammal and Saroja?

(iii) Whether the properties mentioned in paragraph 3(3) of the plaint are the separate properties of the plaintiff?

(iv) Whether the cause of action pleaded is correct and whether the suit for declaration and injunction is maintainable?

(v) To what relief the plaintiff is entitled to?

6. During trial, on the side of the plaintiff P.Ws.1 to 4 were examined and Exs.A-1 to A-8 were marked and on the side of the defendant D.Ws.1 to 4 were examined and Exs.B-1 to B-9 were marked. The trail court on an elaborate consideration of the oral and documentary evidence held that the suit property is not the separate property of the plaintiff, but it is the joint family property of the plaintiff and defendant and other brothers, there was no oral partition as pleaded by the plaintiff and the suit is barred for non-joinder of necessary parties and dismissed the suit. Being aggrieved by that the plaintiff filed an appeal in A.S.No.23 of 2005 before the Sub-Court, Tindivanam, but the same has been dismissed. Being aggrieved by that, the above second appeal has been filed.

7. When the appeal came up for admission notice was directed to be issued to the respondent in the appeal and on receipt of the notice the respondent has entered appearance through his counsel. Heard Mr.V.Raghavachari learned counsel appearing for the appellant and Mr.P.Mani learned counsel appearing for the respondent.

8. The learned counsel for the appellant submitted that the Courts below have failed to consider the fact that the defendant has not established the existence of joint family nucleus and the availability of sufficient income therefrom to purchase the suit property in the name of the appellant. He further submitted that as the patta stands in the name of the appellant and Kists is being paid by the appellant in respect of the suit property, the Courts below should have held that the property was never treated as the joint family property. The learned counsel further submitted that the appellant had his own business and separate income and utilising that only the suit property has been purchased but the same has not been properly considered by the Courts below.

9. Both the Courts below have extensively considered the oral and documentary evidence available on record. The trial court has by applying correct principles of law has proceeded to consider as to whether the suit property is the separate property of the

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plaintiff or joint family property. Admittedly an extent of 30 kuli of land was owned by Swaminatha Gounder and the mother of the plaintiff and defendant-Muniammal was owning 4 acres of land and there is no dispute that the said lands were being enjoyed by the joint family as the joint family property. The Courts below have pointed out that from the income derived from the said properties the marriages for all the sons and daughters have been performed and the properties have been purchased under Exs.B-1 to B-4. The purchases under Exs.B-1 to B-4 are from 1963 to 1981. Under Ex.B-1 some properties have been purchased in the name of the plaintiff on 11.03.1963 and under Ex.B-2 to B-4 dated 05.11.1976, 30.03.1978 and 25.04.1981 respectively the properties have been purchased jointly in the name of all the 5 brothers. When admittedly the above said properties have been purchased from the income derived from the above said property owned by the joint family, the Courts below have held that there was joint family nucleus and income was generated therefrom and there was surplus income to purchase the properties in the name of the joint family members and that being so the contention of the plaintiff/appellant that the suit property covered by Ex.A-1 alone is not the joint family property but it is the separate property of the plaintiff cannot be accepted.

10. The Courts below have also pointed out that the plaintiff has failed to prove that the suit property was purchased in his name from his self-earnings. As pointed out by the Courts below the plaintiff was aged about 20 or 22 years in 1963 when the suit property was purchased under Ex.A-1 and plaintiff as P.W.1 had admitted that on the date of Ex.A-1-sale deed he was not married. In the plaint it is pleaded by the plaintiff that the suit property was purchased by the income derived by him by rearing goats. But in his oral evidence he has claimed that the suit property was purchased from the income derived by him from the cloth business carried on by him. Therefore, it is clear that the plaintiff's testimony is not reliable. The plaintiff examined P.Ws.2, 3 and 4 but as P.W.4 was not available for cross examination his evidence has been eschewed. Though P.W.2 had deposed that the plaintiff had purchased the property utilising the income derived by him from rearing goats he was not able to state as to when the suit property was purchased and for how much the same was purchased and other details. P.W.3 has not deposed as to from which income the plaintiff purchased the suit property. Infact in his cross examination P.W.3 has categorically stated that he is not aware as to from which income the plaintiff purchased the suit property. Considering the above said aspects the Courts below have rightly come to the conclusion that the suit property has been purchased from the income derived from the joint family nucleus and it is not the separate property of the plaintiff as claimed by him.

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11. The Courts below on an analysis of the oral evidence and purchases of properties under Exs.B-1 to B-4 during the periods 1963 to 1981 and from the admission of P.W.1 that the property purchased on 11.03.1963 in the name of the plaintiff was for the benefit of the joint family and also considering the evidence of D.W.3 and D.W.4 the other brothers of the plaintiff and defendant and also taking into consideration the absence of averments relating to the date and year of the alleged oral partition came to the right conclusion that the oral partition pleaded by the plaintiff has not been established. The Courts below have also on an analysis of the testimony of D.Ws.3 and 4 have come to the conclusion that the suit property and other properties purchased under Exs.B-2 to B-4 are joint family properties and though they are being enjoyed by the brothers separately such enjoyment is only for the sake of the convenience and not pursuant to any oral partition as pleaded by the plaintiff.

12. The Courts below have also rightly pointed out that when Swaminatha Gounder had 5 sons and 4 daughters for reasons best known to the plaintiff, he has mentioned about 2 other brothers alone. Though in the written statement it is specifically pleaded that Swaminatha Gounder had 5 sons and 4 daughters and the other sons and daughters are also necessary parties to the suit and the suit is barred for non-joinder of necessary parties the plaintiff has not chosen to implead them as parties. Considering the same both the Courts below have rightly held that the suit is barred for non-joinder of necessary parties.

13. In the light of the above discussion the contention of the learned counsel for the appellant that the Courts below have not properly considered the evidence on record is unsustainable. The learned counsel for the appellant has not pointed out any infirmity in the reasonings of the Courts below. But what he submitted is that since the suit property stands in the plaintiff's name it should be taken that the suit property is the separate property of the plaintiff. Since the property was purchased in the name of the plaintiff under Ex.A-1 naturally the patta and Kists receipts would stand in his name and from that it cannot be concluded that the suit property is the separate property of the plaintiff. The Courts below have thoroughly considered the evidence on record and by applying the right principles of law have recorded concurrent findings that the suit property is not the separate property of the plaintiff but it is the property purchased from the income derived from the joint family nucleus and there is absolutely no error in the reasonings of the Courts below. This Court while exercising power under Section 100 of the Code of Civil Procedure cannot re-appreciate the evidence and come to a different conclusion, unless the

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findings recorded by the Courts below are not based on record or the same are perverse.

14. The Apex Court in the decision rendered in the case of Thimmaiah and Others Vs. Ningamma and another reported in 2000 (7) S.C.C. 409 in paragraph 13 has observed as follows:-

> "13. But at the same time, this Court has noted that the High Court has no jurisdiction to entertain a second appeal "on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be". In other words, if there is some evidence and the appreciation of the evidence is erroneous, a second appeal will not lie".

and in the same decision it has been further observed that the High Court is not entitled to reassess the evidence and arrive at a different conclusion.

15. In the decision reported in 2000 (10) S.C.C. 244 (M.Nadar Kesavan Nadar Vs. Narayanan Nadar Kunjan Nadar) the Apex Court has laid down as follows:-

> "Even if the finding of fact was wrong, in our opinion this finding of fact could not be disturbed specially when the High Court has not come to the conclusion that the same was not perverse nor was based on no evidence".

16. Therefore, I see no reason to differ from the reasonings of the Courts below and no question of law much less any substantial question of law arises for consideration in the above second appeal.

17. For the above said reasons the second appeal fails and the same is dismissed. However, there will be no order as to costs. Consequently, the connected CMP is closed.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Principal Subordinate Judge, Tindivanam
2. The Additional District Munsif Court, Tindivanam,

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